QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. §4461) to goods loaded for export at ports of the United States violates the Export Clause of the United States Constitution?

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES SHOE CORPORATION, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* ALUMINUM COMPANY OF AMERICA, ALCOA INTERNATIONAL, S.A., ALCOA INTER-AMERICA, INC., ALCOA MEMORY PRODUCTS, INC., H-C INDUSTRIES, INC. AND THE STOLLE CORPORATION IN SUPPORT OF RESPONDENT

SUPPLEMENTAL STATEMENT OF STATUTORY PROVISIONS INVOLVED

The parties exclude several relevant sections of 26 U.S.C. §4462 from their statement of the constitutional and statutory provisions involved, including:

§ 4462. Definitions and special rules

* * *

(a)(4) **Commercial vessel.** -

(A) In general. - The term "commercial vessel" means any vessel used -

(i) in transporting cargo by water for compensation or hire, or

(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

* * *

(b) Special rules for Alaska, Hawaii, and possessions.-

(1) In general. - No tax shall be imposed under section 4461(a) with respect to -

(A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,

(B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,

(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any

possession of the United States, or in the United States mainland, respectively, or

(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

(2) Cargo does not include crude oil with respect to Alaska.- For purposes of this subsection, the term "cargo" does not include crude oil with respect to Alaska.

(3) United States mainland. - For purposes of this subsection, the term "United States mainland" means the continental United States (not including Alaska).

(c) Coordination of tax where transportation subject to tax imposed by section 4042. - No tax shall be imposed under this subchapter with respect to the loading or unloading of any cargo on or from a vessel if any fuel of such vessel has been (or will be) subject to the tax imposed by section 4042 (relating to tax on fuel used in commercial transportation on inland waterways).

(d) Nonapplicability of tax to certain cargo. -

(1) In general. - Subject to paragraph (2), the tax imposed by section 4461(a) shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country.

(2) Imposition of charges. - Paragraph (1) shall not apply to any cargo exported to Canada or Mexico -

(A) during the period -

(i) after the date on which the Secretary determines that the Government of Canada or Mexico (as the case may be) has imposed a substantially equivalent tax, fee, or charge on commercial vessels or commercial cargo utilizing ports of such country, and

(ii) subject to subparagraph (B), before the date on which the Secretary determines that such tax, fee, charge has been discontinued by such country, and

(B) with respect to a particular United States port (or to any transaction or class of transactions at any such port) to the extent that the study made pursuant to section 1407(a) of the Water Resources Development Act of 1986 (or a review thereof pursuant to section 1407(b) of such Act) finds that -

(i) the imposition of the tax imposed by this subchapter at such port (or to any transaction or class of transactions at such port) is not likely to divert a significant amount of cargo from such port to a port in a county contiguous to the United States, or that any such diversion is not likely to result in significant economic loss to such port, or

(ii) the nonapplicability of such tax at such port (or to any transaction or class of transactions at such port) is likely to result in

significant economic loss to any other United States port.

(e) **Exemption for the United States.** - No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.

(f) Extension of provisions of law applicable to customs duty.-

(1) In general.-Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

* * *

(g) **Special rules.** - Except as provided by regulations -

* * *

(2) Exception for intraport movements.- Under regulations, no tax shall be imposed under section 4461(a) on the mere movement of cargo within a port.

(3) Relay cargo. - Only 1 tax shall be imposed under section 4461(a) on cargo (moving under a single bill of lading) which is unloaded from one vessel and loaded onto another vessel at any port

in the United States for relay to or from any port in Alaska, Hawaii, or any possession of the United States. For purposes of this paragraph, the term "cargo" does not include any item not treated as cargo under subsection (b)(2).

(h) **Exemption for humanitarian and development assistance cargos.** - No tax shall be imposed under this subchapter on any nonprofit organization or cooperative for cargo which is owned or financed by such nonprofit organization or cooperative and which is certified by the United States Customs Service as intended for use in humanitarian or development assistance overseas.

(i) **Regulations.** - The Secretary may prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter including, but not limited to, regulations -

* * *

(3) exempting any transaction or class of transactions from such tax where the collection of such tax is not administratively practical, and

(4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims.

INTEREST OF *AMICI CURIAE*

Amici curiae ("*Amici*") file this brief with the consent of all parties.[1] *Amici* seek to apprise the Court of interests other than those presented by the parties and to direct the Court's attention to the broader implications of the Court's ruling. For the period covering the fourth quarter of 1992 through and including the third quarter of 1996, *Amici* paid in excess of $2.5 million in harbor maintenance taxes ("HMT") on exports. *Amici* seek to recover these payments in several lawsuits filed in the Court of International Trade ("CIT"). These cases have been stayed pending resolution of this "test" case. *Amici,* along with several other companies, filed *amicus* briefs with the CIT and with the Court of Appeals for the Federal Circuit and participated in oral argument before the CIT in this case.

Because the HMT imposes a burden on exports, the imposition of the tax is a matter of serious concern to *Amici*. *Amici* and related entities are significant exporters of merchandise from the United States, having exported, primarily by sea, in excess of $1.2 billion worth of goods from the United States in 1996 and again in 1997. Because it is imposed on exporters, the HMT burdens *Amici's* exportation of goods by ship into the stream of international commerce and impairs the ability of *Amici* to transact business and compete in international markets.

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[1] Pursuant to Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Exports, and the access to ports that make exports possible, are matters of national interest. They not only benefit the ship owners and operators who transport merchandise to other countries and the companies that export merchandise overseas, but also a host of other parties, including manufacturers, sub-suppliers, dock and stevedoring providers, transporters who bring merchandise to ports, logistics and communications companies that arrange foreign shipments of merchandise and the cities and states throughout the country that derive benefits from the jobs and profits created by export transactions. It is no doubt in recognition of these benefits to the general welfare that for over two hundred years, the costs of port dredging were funded out of general tax revenues.

By placing the burden of funding a core governmental function such as port dredging on a limited class of indirect beneficiaries of such activity, as the HMT does, the Congress has unfairly and discriminatorily impeded the ability to export free of restrictive taxes and duties that the Export Clause was designed to prohibit. If this Court allows Congress to succeed in this approach under the guise of the faulty user fee rationale being argued by the United States, it will open the door to the wholesale shifting of funding of general welfare activities through unconstitutional taxation of a limited class of indirect beneficiaries -- a result squarely prohibited by the Export Clause.

Moreover, there is no broad user fee exception to the Export Clause. Even if there was, the HMT is not a valid user fee. It fails the user fee criteria developed by this Court in cases arising under Constitutional provisions which are less restrictive than the Export Clause by: (1) being

imposed in a discriminatory manner; (2) failing to offer benefits to taxpayers commensurate with the amount of tax paid; and (3) generating revenue far in excess of the cost of any conceivable harbor maintenance project. Indeed, the Government's own federal budget does not include the HMT in its listing of user fees.

ARGUMENT

I. The HMT is an Impermissible Tax

A. Background.

For almost two hundred years, the costs of developing, operating and maintaining the Nation's harbors and ports were paid from general tax revenues. S. Conf. Rep. No. 228, 99th Cong., 2d Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705 at 6709. In 1986, Congress enacted the Water Resources Development Act, Pub. L. 96-662 (Nov. 17, 1986) (the "WDRA"), which included the HMT -- at the time, a 0.04% tax on merchandise loaded at any port. The rate was increased to 0.125% in 1991. 26 U.S.C. § 4461 *et seq*. The Senate Report described the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance." S. Rep. No. 126, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644 (emphasis supplied).

Indeed, the HMT has all the hallmarks of a tax. It funds a core government function which confers benefits upon the public at large. It is imposed on exports on an *ad valorem* basis, 26 U.S.C. §4461(b), contains penalties for failure to pay, 19 C.F.R. §24.24(h) and 26 U.S.C. § 4462(f)(1), and serves a revenue raising purpose. The HMT is simply not a user fee.

B. The HMT Confers Benefits on the Public at Large Which Should be Funded from the General Revenue.

The HMT is imposed in order to fund port dredging, to ease vessel access into and out of United States ports. *See* S. Conf. Rept. No. 228, 99th Cong., 2nd Sess., *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714 (additional views of S. Lautenberg). Yet, the HMT is not imposed on ship owners and operators, the direct beneficiaries of the port dredging activities, but rather on a limited class of indirect beneficiaries -- exporters. There are numerous other indirect beneficiaries of port dredging, including manufacturers, sub-suppliers, dock and stevedoring providers, transporters who bring merchandise to ports, logistics communications companies who arrange foreign shipments of merchandise and the cities and states throughout the country that derive benefit from the jobs and profits created by export transactions. Thus, port dredging generates substantially wider benefits than traditional user fee services which are more focused and narrow in benefit.[2]

Because port dredging provides general benefits and aids the general welfare, any funding for such activities must be tax based. *See United States v. City of Huntington*, 991 F.2d 71, 74 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1048 (1994) (rejecting argument that fees charged for core government functions, including fire and flood protection and street maintenance, constituted user fees in less stringent context of intergovernmental immunity from taxation). *See*

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[2] *See, e.g.*, Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 4, User Fees and Other Collections at 61.

also Massachusetts v. United States, 435 U.S. 444, 448 n.3 (1977), *citing*, H.R. Rep. No. 91-601, 91st Cong., 1st Sess. at 3-4, 38 (1969) (noting that since the public at large benefits from the existence and operation of the military, the costs imposed on the national air system by the military should be paid from the general revenues).

Accordingly, the HMT is a tax and thus violative of the Constitution's Export Clause, Art. 1, sec. 9, cl. 5, which broadly prohibits the imposition of a tax or duty on articles exported from any state. If the Court reverses the courts below and sustains the HMT under the faulty "user fee" rationale advanced by petitioner, it will be a green light to Congress that general benefit public welfare activities can increasingly be funded by imposing the financial burdens on a limited class of indirect beneficiaries. As to exports, this result is flatly prohibited by the Export Clause.

C. The Nature and Operation of the HMT Indicate it is a Tax.

The HMT has all of the attributes of a revenue raising tax. The statute authorizing collection of the HMT, which is codified in the Internal Revenue Code, repeatedly calls the levy a tax. 26 U.S.C. §4461-62.

Failure to declare and pay the HMT can subject an exporter to penalties. *See* 19 C.F.R. 24.24(h); 26 U.S.C. §4462(f)(1). While taxes are subject to penalties for failure to pay, most user fees, on the other hand, do not result in such penalties, but rather an inability to use the service being provided by the Government. *United States v. City of Columbia*, 914 F.2d 151, 155-56 (8th Cir. 1990) (noting that

failure to pay tax results in civil or criminal penalties while failure to pay a user fee results in termination of services).[3]

Like a traditional revenue raising tax or duty, the HMT is imposed on an *ad valorem* basis.[4] Because of its *ad valorem* nature, there is little or no connection between benefits received by the taxpayer and the HMT paid. *See Massachusetts v. United States*, 435 U.S. 444, 445 (1977) (in imposing a tax to support the services the government provides to the public at large, a legislature need not consider the value of particular benefits to the taxpayer, but may assess the tax solely on the basis of the taxpayers' ability to pay).

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[3] Typical examples of user fees include the fees for admission to national parks, the sale of postage stamps and electricity and premiums for deposit insurance. Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 4, User Fees and Other Collections at 61. Failure to pay a user fee such as the admission fee for a national park simply precludes the user from accessing the park - it does not subject the user to penalties like the HMT.

[4] The Government contends that by imposing the HMT on an *ad valorem* basis, Congress correlated the amount of the fee to the benefits received because shippers of higher value cargo receive greater benefits in the form of higher profits. Petitioner's Brief at 28. However, as recognized by the Court of Appeals, the profit margin on the sale on goods is in no way a function of the value of the goods; rather, it is a function of mark-up. *See United States Shoe Corp., v. United States*, 114 F.3d 1564, 1574 (Fed. Cir. 1997).

The HMT is also a tax because it serves a revenue raising purpose. *See, e.g., Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992) (a fee which generates revenues which are used to offset unrelated costs or confer unrelated benefits is a tax). The fact that the current balance of the Harbor Maintenance Trust Fund so greatly exceeds any actual, foreseeable or even conceivable amount necessary for harbor dredging shows that the HMT has a revenue raising purpose. *See Moon v. Freeman*, 379 F.2d 382, 392 (9th Cir. 1967) (accumulation of substantial amounts of revenue is indication that levy is impermissible burden on exports). The surplus in the Harbor Maintenance Trust Fund is in excess of $1.1 billion. Department of Treasury Unaudited, Final HMT Income Statement as of September 30, 1997, attached hereto at pages 23-24.

Despite this ever growing surplus, outlays from the Trust Fund are not slated to increase. Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 16, Federal Programs by Agency and Account at 423. *See also, Third Annual Report to Congress on the Harbor Maintenance Trust Fund for FY 1994* ("3d Report") at 5, J.A. 91, __. Rather, the budget projects HMT outlays to remain approximately the same through FY 2002. *Id.* (projecting outlays as follows: FY 1997 - $519 million; FY 1998 - $490 million; FY 1999 - $468 million; FY2000 - $473 million; FY2001 - $482 million; FY 2002 - $484 million). Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 16, Federal Programs by Agency and Account at 423.

The revenue raising purpose of the HMT is equally apparent through the manner in which the federal budget treats the Harbor Maintenance Trust Fund. The Trust Fund is an "on budget" fund; as such, its annual surpluses have been a credit to the federal budget deficit. Budget of the

United States Government for FY 1997, Analytical Perspectives, ch. 16, at 257 (noting that trust fund income exceeds outgo and that surpluses offset the need for the Government to borrow from the public to finance the Federal funds deficit). *See also* Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 17, Trust Funds and Federal Funds at 294. From the onset, Congress was well aware of the effect the HMT would have on the federal deficit. "The increase in net budget receipts [from harbor maintenance taxes] will reduce the potential Federal budget deficit by a like amount..." *See* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985).

These factors point to the inescapable conclusion that the HMT is a tax. Because the Export Clause broadly prohibits the imposition of such a burden on goods in export transit, *see United States v. International Business Machines Corp.*, 517 U.S. 843, __, 116 S.Ct. 1793, 1797, 1803 (1996), the HMT is unconstitutional as it applies to exports.

III. Even Under the *Massachusetts* Test, the HMT Constitutes a Tax.

The Government contends there is a broad user fee exception to the Export Clause. The unqualified language of the Export Clause makes clear that all burdens on exports are prohibited, even if they are not for the purpose of raising revenue. *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1802; *Fairbank v. United States*, 181 U.S. 283, 292-93 (1901).

When user fees have withstood scrutiny by the Court, the Constitutional provision in question was not the Export Clause. *See, e.g., Massachusetts v. United States*, 435 U.S. 444 (1977) (examining levy in the context of state tax immunity doctrine); *Evansville-Vanderbaugh Airport*

Authority Dist. v. Delta Airlines, 405 U.S. 707 (1972) (examining levy under implied constraints of commerce clause). The Court has developed a three-part test in the context of these other constitutional provisions to determine whether a levy constitutes a tax or a user fee. *Evansville*, 405 U.S. 707, 716-717; *Massachusetts*, 435 U.S. 444, 466-470. However, the test developed in these cases cannot just simply be applied to cases arising under the Export Clause, as there are meaningful textual differences between Export and other Constitutional clauses. *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1795.

Assuming, *arguendo*, that the Court were to look to the *Massachusetts* and *Evansville* criteria for guidance, the HMT does not qualify as a valid user fee. Under the *Massachusetts* test, in order to constitute a user fee, a levy: (1) must not be discriminatory; (2) must be based on a fair approximation of use; and (3) must not be excessive in relation to the cost of the government benefit conferred. *Massachusetts*, 435 U.S. at 464. The HMT fails all three prongs of this test.

A. The HMT Is Discriminatory.

First, to qualify as a user fee, an assessment must not be imposed in a discriminatory manner. *See Massachusetts*, 435 U.S. at 460, 466-67 (a nondiscriminatory measure defrays the cost of a federal program by recovering a fair approximation of **each** beneficiary's share of the cost). The HMT is imposed in a discriminatory manner because it discriminates against exports and not all who benefit from harbor maintenance services pay the tax.

The HMT imposes an *ad valorem* tax on commercial goods in export transit, but is not imposed on goods shipped

to certain domestic ports or any ports of possessions of the United States. 26 U.S.C. §4462(a), (b). For example, the exporter of a shipment of goods in export transit bound from the Port of Los Angeles to Japan pays the HMT. However, there is no HMT liability for the exact same shipment of goods, in the very same vessel, making the exact same amount of use of the Port of Los Angeles, if the goods are bound for Hawaii, Alaska or any possession of the United States. 26 U.S.C. §4462(b).

The HMT also exempts from its application goods loaded on a vessel in certain domestic ports and ports of any U.S. possession for transportation to any U.S. state or possession (*i.e.*, from a port in Alaska or Hawaii to Los Angeles). 26 U.S.C. §4462(b). These and numerous other statutory exceptions establish that the HMT discriminates against exports[5] -- unlike the situation in *Massachusetts* and *Evansville* where the fees were nondiscriminatory. *See Massachusetts*, 435 U.S. at 467 (registration tax did not discriminate against state functions since it applied not only to private users of airways, but to civil aircraft operated by the United States); *Evansville*, 405 U.S. at 717 (use and service fee did not discriminate against interstate commerce where both interstate and intrastate flights were subject to same charge).

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[5] These exceptions also establish that the HMT impedes international commerce. The Export Clause "specifically prohibits Congress from regulating international commerce through export taxes." *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1802. With respect to *Amici*, the HMT does just that. Because it is imposed on exporters, the HMT burdens *Amici*'s exportation of goods into the stream of international commerce.

In *Fairbank v. United States*, 181 U.S. 283 (1901), the Supreme Court struck down a ten cent tax on bills of lading which accompanied any exported goods. Bills of lading for domestic goods were only taxed at the rate of one cent. The Supreme Court observed "a discrimination is made between the tax upon an ordinary internal bill of lading and that upon one having respect solely to matters of export." *Fairbank*, 181 U.S. at 290. The HMT also makes an unconstitutional discrimination between port uses for goods in export transit and identical port uses for goods bound for domestic destinations.

Other exemptions also reveal that the HMT is discriminatorily imposed. While most goods in export transit are burdened by the HMT, port uses by the United States or any agency or instrumentality thereof are not. 26 U.S.C. §4462(e). Likewise, there is an exemption for crude oil with respect to Alaska, 26 U.S.C. § 4462(b)(2), for humanitarian and development assistance cargo, 26 U.S.C. § 4462(h), and for exports bound to Canada and Mexico under certain circumstances, 26 U.S.C. § 4462(d)(2). Recreational port users also benefit and pay no tax, nor do importers of merchandise entering the United States under bond for exportation to a foreign country. 26 U.S.C. § 4462(d)(i).

Moreover, appropriations from the Harbor Maintenance Trust Fund are permitted for any eligible "commercial navigation" projects by the Army Corps of Engineers. 33 U.S.C. § 2238. According to the 3d Report, "[m]any projects with 'commercial navigation' as a project purpose have other authorized purposes as well. Such purposes include recreation, hydropower, flood control, water supply and the like." 3d Report at 2, J.A. 91, __. The National Oceanic and Atmospheric Administration is

also allocated $45.5 million for projects with a variety of purposes, including the creation of navigation charts, marine weather forecasting and similar services. 3d Report at 1, J.A. 91, __.

Consequently, the HMT is discriminatorily imposed, particularly against exports. On this basis alone, the HMT fails the *Massachusetts* test and amounts to an unconstitutional tax on exports.

B. There is No Relationship Between the Charge and the Benefits Conferred.

In examining a levy in the context of other Constitutional clauses, this Court has held that while a user fee need not be "precisely calibrated" to match the benefit conferred, a "user fee [must] be a 'fair approximation of the cost of the benefits supplied.'" *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), *quoting Massachusetts v. United States*, 435 U.S. at 463 n.19. Since this case arises in the context of the Export Clause, if a user fee type analysis is adopted, the Court should, at least, require HMT charges to be "closely calibrated" to match the value of port use. They are not.

It is impossible to conclude that the HMT bears a direct relationship, much less a reasonable or fair one to the benefits exporters derive from port use. First, the amount of the tax is, in most cases, irreconcilable with any benefit received from the port use because the tax is calculated on an *ad valorem* basis. 26 U.S.C. §4461(b). A vessel requiring little underwater clearance with a cargo of precious diamonds receives no benefit from harbor dredging, yet it bears a disproportionately high share of HMT. On the other hand, deep draft vessels carrying low value, bulk cargo

benefit from harbor dredging and the resulting deeper harbors to a far greater extent. Yet, the cost to the high value shipper is greater. The HMT does not identify specific, relevant factors (such as amount of time spent in the harbor, depth of draft of the vessel, depth of the harbor) for setting fees.

While some *ad valorem* user fees have been upheld in the face of constitutional challenges, *see, e.g., Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), those cases did not involve constitutional challenges under the absolute prohibition against burdens on exports contained in the Export Clause. In *Sperry*, the *ad valorem* fee at issue was challenged under the Just Compensation Clause. 493 U.S. at 61. Moreover, the fee at issue was assessed against the direct beneficiary of the process. In this case, the direct beneficiaries, deep draft vessel owners and operators, do not pay -- those who export goods into the stream of international commerce do. *See also Alamo*, 906 F.2d at 520 (where fee was imposed on the direct beneficiary of the use of the airport and the challenge was under the Commerce Clause).

Second, many who clearly benefit from the HMT pay no tax at all. A vessel requiring deep draft clearance entering a port for repairs, crew change, re-fueling, or to avoid a storm, may derive benefits from port use, yet by refraining from loading or unloading, it pays no tax at all. The same is true for military and other exempted vessels. *See* 26 U.S.C. §4462. Additionally, a cargo vessel that unloads and departs from a port pays no export HMT notwithstanding its burden on port resources. 26 U.S.C. §4462.

The HMT most directly benefits vessel owners and operators, yet they have no HMT liability. S. Rep. No. 126, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 ("The tax in title 8 is not on the harbor, nor is it on the vessel's operator or owner."). In fact, in its report on the Water Resources Development Act of 1986, Pub. L. No. 99-662 (Nov. 17, 1986), the Senate Committee on Environment and Public Works noted: "[t]hese fees and taxes offset services rendered to vessels." S. Rep. No. 126, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

Third, there is also no correlation between the amount of money spent on a port's maintenance and the amount of revenue collected from that particular port. The majority of HMT revenues are paid by exporters in major U.S. ports, yet monies dispersed from the Harbor Maintenance Trust Fund benefit other ports more.[6] Indeed, the United States conceded that "[t]here is no relationship between the amount of money spent on a port's maintenance and the amount of revenue collected from cargo moving in or out of that particular port." *Corps of Engineers Briefing Book and Fact Sheets on the HMT and Fund* at 1 (Feb. 14, 1990), J.A. 75, __.

Because the HMT fails to offer benefits to taxpayers correlative with the amount of tax they pay, the HMT fails

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[6] *See, e.g., Army Corps of Engineers Estimated Receipts of Harbor Maintenance Fee from Cargo Transporting Major Ports* (1992)(draft), J.A. 85, __, (noting that, of $78,711,000 estimated 1992 taxes on exports and imports from the Port of Los Angeles, only $162,000 was returned in port operation expenditures).

the second prong of the *Massachusetts* test. On this basis alone, the HMT constitutes an unconstitutional tax.

C. HMT Revenues Exceed Costs.

The HMT fails the third prong of the *Massachusetts* test because it generates revenues that greatly exceed the cost to the Government of port dredging. As noted above, the surplus in the Harbor Maintenance Trust Fund is currently in excess of $1.1 billion. Department of Treasury Unaudited, Final HMT Income Statement as of Sept. 30, 1997, attached hereto at page 23-24. There is no reasonable expectation that these moneys in the Trust Fund will be spent at any time in the foreseeable future for harbor maintenance and operation - especially since HMT revenues continue to grow while projected expenditures are flat. *See* Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, Ch. 16, Federal Programs by Agency and Account at 423.

Because a user fee must be no greater than the Government's cost, *National R. Passenger Corp. v. City of New York*, 695 F.Supp. 1570, 1575 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 710 (2d Cir. 1989), and because the surplus accumulating in the HMF indicates that HMT collections vastly exceed the cost of any foreseeable harbor operations and maintenance, the HMT fails the third prong of the *Massachusetts* test and, on this basis alone, constitutes an impermissible tax.

IV. The Federal Budget's Own Treatment of the HMT Shows it is not a User Fee

Indeed, and perhaps most importantly in light of the Government's arguments here, the federal budget does not even treat the HMT as a user fee. *See* Budget of the U.S. for FY 1998, Analytical Perspectives, User Fees and Other Collections, ch. 4 at 61-66. The Federal Government characterizes user fee income as "income from its various business-type activities." *Id.* at 61. The Government's listing of user fee income includes such items as the sale of postage stamps and electricity, premiums for deposit insurance and rents and royalties for the right to extract oil from the Outer Continental Shelf, **but not the HMT**. *Id.* at 61. Unlike these business-type activities in which the Government engages -- in competition with private providers -- maintaining the Nation's harbors is a core government function. Consequently, under the Government's own definition, the HMT fails to qualify as a user fee.

CONCLUSION

Because the harbor maintenance tax is an unconstitutional burden on exports, the decision of the Court of Appeals for the Federal Circuit, *United States Shoe v. United States*, 114 F.3d 1564 (1996), should be affirmed.

Respectfully submitted,

Melvin S. Schwechter
John C. Cleary
Julie A. Coletti

January 15, 1998

UNAUDITED
FINAL

Harbor Maintenance
Trust Fund
20X8863
Income Statement
For the Period 10/01/96 Through 09/30/97

	Current Month	Year-To-Date
RECEIPTS		
Revenue		
Tax on Imports	$ 38,612,472.63	$ 434,037,127.71
Tax on Exports	28,883,830.09	214,017,353.39
Tax on Domestics	5,401,086.74	34,819,510.09
Tax on Passengers	861,281.28	3,987,639.80
Tax on Foreign Trade	6,644,317.33	48,975,998.88
Total Revenue	$ 72,802,948.29	$ 735,533,629.87
Investment Income		
Interest on Investments	$ 480,829.27	$ 53,632,410.87
Accrued Interest Income	4,811,201.07	1,503,578.32
Total Investment Income	$ 5,292,030.34	$ 55,135,989.19
Total Other Income	$ 78,094,978.63	$ 790,669,619.06
Net Receipts	$ 78,094,978.63	$ 790,669,619.06
OUTLAYS		
Operating Exp - Misc. Returns	$ 0.00	$ (26.25)
NONEXPENDITURE TRANSFERS		
Transfer to SLSDC	$ (1,422,296.00)	$ (10,322,396.00)
Transfer to Corps of Engineers	(74,130,021.65)	(535,986,960.00)
Transfer to Transportation	0.00	(193,000.00)
Transfer to Customs	0.00	(3,000,000.00)
Total Outlays/Transfers	$ 75,552,317.65	$ 549,502,229.75
NET INCREASE/(DECREASE)	$ 2,542,660.98	$ 241,167,389.31

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Harbor Maintenance
Trust Fund
20X8863
Balance Sheet
As of 09/30/97

ASSETS		
Undisbursed Balances:		
Funds Available for Investment	3,713.33	
Total Undisbursed Balance		$ 3,713.33
Receivables:		
Investments :		
MX Bill Mat 9/30/98	$ 1,167,290,000.00	
Unamortized Discount	(55,051,226.56)	
Net Investments		$ 1,112,238,773.44
TOTAL ASSETS		$ 1,112,241,486.76
LIABILITIES & EQUITY		
Liabilities:		
Equity:		
Beginning Balance	$ 871,074,097.45	
Net Change	241,167,389.31	
Total Equity		$ 1,112,241,486.76
TOTAL LIABILITY/EQUITY		$ 1,112,241,486.76

Bureau of Public Debt
Office of Public Debt Accounting
Government Securities Management Branch
Trust Funds Team
Date:

OCT 23 1997